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October 19, 2004

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington, DC 20554

In the Matter of:
Unbundled Access to Network Elements
WC Docket No. 04-313
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers
WC Docket No. 01-338

Dear Ms. Dortch:

Enclosed for filing please find the Office of Consumer Advocate's Reply Comments in the above-referenced matter. Please also note that these Reply Comments have been filed with the Commission **electronically**.

Please indicate your receipt of this filing on the additional copy provided and return it to the undersigned in the enclosed self-addressed, postage prepaid, envelope. Thank you.

Sincerely yours,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosure
cc: Best Copying & Printing, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	:	
	:	
Unbundled Access to Network Elements	:	WC Docket No. 04-313
	:	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	:	WC Docket No. 01-338

I hereby certify that I have this day served a true copy of the foregoing document, Office of Consumer Advocate's Reply Comments, upon parties of record in this proceeding.

Dated this 19th day of October, 2004.

Respectfully submitted,

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BEFORE THE
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In the Matter of	:	
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Unbundled Access to Network Elements	:	**WC Docket No. 04-313**
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Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	:	**WC Docket No. 01-338**

REPLY COMMENTS OF THE PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE

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Dated: October 19, 2004

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I. INTRODUCTION

The Pennsylvania Office of Consumer Advocate ("PA OCA") hereby submits these Reply Comments in response to the Order and Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("FCC") on August 20, 2004 in the above-captioned proceeding. The PA OCA represents the interest of Pennsylvania consumers in utility proceedings at both the state and federal level.[1] The PA OCA has been active in setting the terms of unbundled network elements ("UNE") and local telephone competition at both the state and federal level including advocating consumer interests on behalf of members of the National Association of State Utility Consumer Advocates ("NASUCA") before the FCC.

Through the NPRM, the FCC solicits comments on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Telecommunications Act of 1996 ("TA-96")[2] in a manner consistent with the U.S. Court of Appeals for the District of Columbia's decision in USTA II.[3] In response to the NPRM, Verizon, of which Verizon Pennsylvania and Verizon North as operating in Pennsylvania are affiliates, as well as other Regional Bell Operating Companies ("RBOCs") and their national trade organization, the United States Telecom Association ("USTA"), filed responses touting, among other things the "technological and market developments since the Triennial Review Order" that "further demonstrate that competitors are not impaired without access to unbundled mass market switching" under Section 251 of TA-96.[4] The PA OCA files these Reply Comments to rebut those assertions and illustrate how Verizon has failed to meet its burden of proving that competitive local exchange carriers

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[1] *See*, 71 P.S. §309-4.
[2] 47 U.S.C. §151, *et seq.*
[3] NPRM at ¶ 1; *citing*, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004)("USTA II"), *certiori denied in* National Ass'n of Regulatory Utility Com'rs v. US Telecom Ass'n, __ S.Ct. __, 2004 WL 2069543 (Oct. 12, 2004).
[4] *See*, Verizon Ex Parte dated June 24, 2004, Docket No. 01-338 (letter of Dee May, Vice President Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission)("Verizon Ex Parte").

("CLECs") are not impaired without access to the UNE platform ("UNE-P") under Section 251 of TA-96.

In general, and as the PA OCA articulated in its Comments filed on October 4, 2004, the FCC should continue to require incumbent local exchange carriers ("ILECs"), such as Verizon, to provide the UNE-P to CLECs – particularly in the mass market. The UNE-P is the basis for much of the local residential telephone competition in Pennsylvania, as well as other states. The PA OCA recognizes that the UNE-P may not be a sufficient basis for long-term competition in the provision of local telecommunications service. However, it is still too early to remove the UNE-P as an alternative for CLECs to provide competing service. If Verizon-Pennsylvania and Verizon North (collectively referred to as "Verizon"), the dominant Pennsylvania ILECs, were no longer required to offer the UNE-P to CLECs, a substantial portion of local residential competition in Pennsylvania would disappear.

In support of its Reply Comments, the OCA submits as follows:

II. REPLY COMMENTS

A. There Is No Evidence Of Record That Supports A Finding That Competitors Are Not Impaired Without Access To Mass Market Switching In Pennsylvania.

On October 4, 2004, Verizon, along with Bell South Corporation, SBC Communications, Inc. and Qwest Communications International, Inc., collectively filed a report titled "UNE Fact Report 2004" ("RBOC filing"). In this filing, the RBOCs assert that "local telecommunications markets are vastly more competitive today than they were in 1996" [5] and allege that cable telephony, including VoIP, and wireless service providers create alternatives for local telephone service. As discussed further below, the presence of intermodal competition

[5] UNE Fact Report 2004, Prepared for and submitted by BellSouth, SBC, Qwest and Verizon, WC Docket No. 04-313, October, 2004 ("RBOC Filing") at I-1.

should be afforded limited weight in a Section 251 analysis. However, in their filing, the RBOCs also provide data regarding circuit switching and wireline loops and claim that "competing carriers operate a large embedded base of circuit switches that have been used to serve millions of mass-market customers in the past."[6] Generally, the information provided in the RBOC filing is provided on a nationwide, or RBOC-wide, basis. However, Appendix D to this filing, titled "CLEC Networks by MSA," provides a more specific breakdown of the purported competitive presence in the top 150 Metropolitan Service Areas ("MSAs"). Included in these top 150 MSAs are eight (8) MSAs in Pennsylvania.[7]

Furthermore, in the Verizon Ex Parte filing of June 24, 2004, Verizon discusses the competitive presence in three Pennsylvania MSAs (Philadelphia/Camden/Wilmington, Pittsburgh and Allentown/Bethlehem/Easton) in an attempt again to show that competitors are not impaired without access to mass market switching, the UNE-P, in those MSAs. Verizon makes essentially the same assertion as in the RBOC filing that the presence of cable telephony, including VoIP, and wireless providers evidences a significant competitive presence throughout Verizon's territory. However, Verizon then also provides more specific data in the 25 largest MSAs in its service territory regarding the number of CLECs and CLEC switches serving mass market customers in Verizon's portion of those MSAs.[8]

As discussed further below, the data submitted in each of these filings does not support a finding that competitors are not impaired without access to mass market switching, the UNE-P, in Pennsylvania. It is unclear whether Verizon used a sound methodology to obtain the data it submitted in this proceeding. At other times, the data is not sufficient to support a finding

[6] Id. at II-37.
[7] Those eight MSAs are: 1) Philadelphia/Camden/Wilmington; 2) Pittsburgh, 3) Allentown/Bethlehem/Easton, 4) Scranton/Wilkes-Barre, 5) Harrisburg/Carlisle, 6) Lancaster, 7) York/Hanover and 8) Reading.
[8] Verizon Ex Parte at Attachments 10, 11 and 12.

of non-impairment under Section 251. As such, Verizon has not met its burden of proving that it should no longer be required to provide competitors access to the UNE-P in Pennsylvania and the FCC here should make no finding that would eliminate a CLECs ability to purchase the UNE-P from Verizon in Pennsylvania.

B. Verizon Has Not Met Its Burden Of Proving That CLECs Are Not Impaired In The Mass Market In Pennsylvania Without Access To The UNE-P Pursuant To Section 251 Of TA-96 Because The Evidence Of Record In This Proceeding Is Faulty And Should Be Rejected.

1. Introduction

The record evidence at this docket that is presented by Verizon is based on a faulty methodology. Additionally, the data provided is not adequate to sufficiently draw the necessary conclusions that Verizon seeks in this proceeding. As such, the evidence cannot be used to support a finding that CLECs are not impaired without access to the UNE-P in Pennsylvania. Each of these issues is discussed below. Therefore, ultimately, the FCC must conclude that Verizon has not met its burden of proving that CLECs are not impaired without access to the UNE-P in Pennsylvania pursuant to Section 251 of TA-96 as there is no evidence of record that supports such a finding. To find otherwise would be to base a decision on an insufficient amount of credible evidence needed to support such a finding.

2. The methodology used to develop Verizon's record evidence is faulty.

The evidence of record provided by Verizon in this proceeding is flawed because the methodology used to obtain the data is faulty. This issue was recognized in the PA TRO proceeding[9] and undermines the credibility of the data Verizon presented in this proceeding. Furthermore, this issue does not appear to be corrected in the record evidence of this FCC

[9] Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, Order (entered Oct. 2, 2003)("Pennsylvania TRO Proceeding").

proceeding and, thus, Verizon has not provided evidence in this record that evidences that CLECs are not impaired without the UNE-P in Pennsylvania.

The primary example of Verizon's flawed methodology arose in the Pennsylvania TRO Proceeding. In that proceeding, presiding officer, Administrative Law Judge Michael C. Schneirle, determined that Verizon's definition of mass market customer meant that if a CLEC uses a switch to serve any customers with a DS0 line, that CLEC is counted as serving the mass market. This was so even if most of the lines connected to the switch are high capacity digital circuits. ALJ Schnierle explained this point in a line of questioning from the bench as follows:

> JUDGE SCHNEIRLE: Wait; I want to ask a question. I'm going to hopefully try to cut to the chase here. Let's say you find a switch and it's got nothing but DS-3s and OCNs attached to it. That doesn't count, right?
>
> [Verizon] WITNESS WEST: That wouldn't be a switch serving mass market customers; right.
>
> JUDGE SCHNEIRLE: If I find a switch that's got OCNs and DS-3s attached to it and one DS0, is that a mass market switch?
>
> [Verizon] WITNESS WEST: It is a switch serving a mass market customer, and it would count as a trigger.
>
> JUDGE SCHNEIRLE: So it's Verizon's position, if I found three of those in one market segment, the Commission should essentially cut off all residential UNE-P. If I found three switches, each with one DS0 that might be serving, for all I know, the president of the company or something like that, or a fax machine, under the TRO, the Commission should essentially cut off all UNE-P to every residential customers in that market. That's Verizon's position?
>
> [Verizon] WITNESS WEST: That's a very extreme hypothetical. I think that is consistent with Verizon's position, but it's not consistent with the evidence that we present to show that there is no impairment to local switching.[10]

[10] PA TRO Proceeding, Tr. 94-95.

The PA OCA recognizes that the parameters established by the Triennial Review Order[11] may no longer be strictly applied to this proceeding, but the fundamental flaw in how Verizon identifies a switch that serves the mass market remains.

As such, the PA OCA is concerned that the "mass market" lines submitted by Verizon to the FCC may clearly suffer from the same problems as identified by ALJ Schneirle in the PA TRO proceeding. Verizon has not clearly explained why one DS0 provisioned on a switch containing multiple DS3's should mean that a CLEC is providing mass market service through that switch and satisfy the Section 251 unbundling analysis. Such a fault undermines Verizon's entire presentation of evidence. Enterprise customers may also purchase DS0s but simply because a customer buys a DS0 does not make the customer part of the mass market. It may be that the CLEC sells DS0s under an "enterprise" contract to a small branch office, a fax machine, or the home residence of the Chief Executive Officer of the company. The PA OCA submits that such a customer does not qualify as a mass market customer.

ALJ Schnierle also noted that, consistent with Verizon's position regarding DS0's, the data provided by Verizon in the PA TRO proceeding does not separate residential from small business lines. ALJ Schneirle noted that Verizon's position is that "it is sufficient for a CLEC to be considered a trigger candidate for 'mass market switching' for the CLEC to provide any service to businesses over DS0 lines. Thus, it is impossible to determine from Verizon's compilation those lines that serve residential customers."[12] Verizon's position on this

[11] Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-146, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003)("Triennial Review Order" or "TRO"), *vacated in part and remand in part in*, 359 F.3d 554 (D.C. Cir. 2004).

[12] Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, Summary of Record Evidence (dated June 24, 2004) ("Schneirle Summary") at 9 (emphasis supplied).

issue during the PA TRO proceeding also calls into question the validity of the data Verizon submitted into the record at this docket.

Finally, ALJ Schneirle noted that some of the CLECs that Verizon alleges are providing alternative service in certain markets in Pennsylvania may, in fact, be providing service only in the "form of a trial of some sort that may or may not be active."[13] As such, the individual CLECs named in the RBOC filing also raise questions as to their ability to provide competitive service and the impact of that fact on any Section 251 unbundling analysis. It is clear from a review of these issues that the evidence that Verizon submitted in this proceeding to support a finding that CLECs are not impaired without access to the UNE-P in Pennsylvania is suspect. The FCC should not make such a critical decision that affects the telecommunications service of hundreds of thousands of Pennsylvanians based on evidence that suffers such deficiencies.

Verizon must be held to standards that require reliable evidence be provided to support a determination under Section 251 that CLECs may not be impaired without access to the UNE-P in Pennsylvania, particularly in light of the significant number of customers who are provided competitive service via the UNE-P. The FCC should not remove the single largest method by which competitors provide local exchange service in Pennsylvania based on evidence that was gathered using a faulty methodology.

As such, Verizon has not met its burden of proving that CLECs in the mass market are not impaired in Pennsylvania without access to the UNE-P under Section 251 of TA-96. The evidence presented by Verizon in this proceeding should be rejected because it, among other things, was obtained using a faulty methodology. The FCC must act now to ensure that

[13] Schneirle Summary at 12.

CLECs have access to the UNE-P from Verizon in Pennsylvania or they will be impaired in their efforts to provide competitive service.

3. Assuming Verizon's data is correct, that data is not sufficient to support a finding of non-impairment in the mass market for the provision of UNE-P in Pennsylvania.

In addition to the various faults with the evidence Verizon has placed into the record, the FCC should not make any findings that CLECs are not impaired in the mass market without access to the UNE-P in Pennsylvania because Verizon's data does not provide sufficient evidence of a competitive presence in certain markets to satisfy the unbundling analysis of Section 251. As such, the FCC must ensure that CLECs in Pennsylvania have continued access to the UNE-P so that a truly competitive market can continue to develop and consumers can reap the benefits of that market. Unfortunately, however, such a market is not present in Pennsylvania.

For example, in Appendix D of the RBOC filing, the RBOCs list the presence of CLECs in the top 150 MSAs in the country. For three of the Pennsylvania MSAs listed in that Appendix, there are two or less CLECs providing service in those MSAs:

MSA	**# of CLECs Verizon claims**
Scranton/Wilkes-Barre	2
York/Hanover	not available
Reading	1

Clearly, this evidence is insufficient to support a finding that CLECs are not impaired without access to the UNE-P in those MSAs. The presence of two CLECs is insufficient to declare a market competitive.

Verizon's claims are further suspect when considering the specific CLECs they identify as serving in these MSAs. For example, Verizon has named a cable company, RCN, as a CLEC in two MSAs in Pennsylvania. As the PA OCA explained in its October 4th Comments, the presence of a cable telephony provider is not indicative of a sufficient competitive presence under a section 251 analysis because cable companies have distinct economic and other advantages over new entrants.[14]

Additionally, the market share obtained by each of these CLECs may also not support a finding that CLECs are not impaired without access to the UNE-P in Pennsylvania. CLEC market share is a concern, given that some CLECs are only providing service to an extremely limited number of mass market customers in a particular geographic area. For example, the evidence of record submitted by Verizon in the PA TRO proceeding reveals that, in several instances, they included CLECs as competing in a particular geographic market even if that CLEC was only providing service to one customer.[15] A CLEC providing service to one customer in a given geographic area cannot reasonably be considered as providing competitive service in that geographic area.

CLEC market share is also a concern for those companies who may be serving a large number of mass market customers but where such number still represents a small portion of the overall market in a given geographic area. For example, the RBOC filing indicates that there are 119,000 mass market lines served in the Philadelphia/Camden/Wilmington MSA. While 119,000 certainly is a significant number of customers, the overall percentage when compared to customers still served by the incumbent remains small, particularly when considering that this figure includes not just the Philadelphia portion of that MSA but portions of Delaware and New

[14] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Comments of the Pennsylvania Office of Consumer Advocate (dated Oct. 4, 2004)("PA OCA Comments") at 15-17.
[15] *See*, PA TRO Proceeding, Verizon Main Brief at Exhibit 1, Part A, at 1-2.

Jersey as well. The PA OCA noted in its October 4th Comments the importance of considering market share in addition to the raw numbers of customers served by CLECs as demonstrated in a Herfindahl-Hirschman Index ("HHI") analysis conducted by a witness for the PA OCA in the PA TRO proceeding.[16] The results of that analysis showed that Verizon still dominates its service territory in Pennsylvania even where CLECs may have obtained some customers.

Additionally, as noted above regarding the flaws in Verizon's methodology, Verizon included in its list of CLECs those CLECs who may, in fact, be providing service only in the form of a trial, or otherwise not be active, and were not providing service to real customers. Certainly, any CLEC providing service via a trial should not be counted in any Section 251 unbundling analysis.

Therefore, the PA OCA submits that Verizon has not met its burden of proving that CLECs are not impaired in Pennsylvania without access to the UNE-P pursuant to Section 251 of TA-96 because there is not a sufficient amount of relevant data provided in the record of this proceeding to support such a finding. Verizon has not shown that a finding of non-impairment is appropriate and its claims otherwise should be rejected.

4. Conclusion.

As such, the PA OCA submits that Verizon has not met its burden of proving that CLECs are not impaired in the mass market in Pennsylvania without access to the UNE-P pursuant to Section 251 of TA-96. Verizon has failed to address questions regarding the flawed methodology it used to acquire the data it relies upon in this proceeding. Overall, the evidence submitted by Verizon into the record of this proceeding cannot be relied upon to make the necessary finding Verizon seeks. In some instances, the problems with the data discussed above

[16] PA OCA Comments at 3-4.

renders the evidence invalid. In other instances, the methodology used to obtain the data is faulty and renders the evidence invalid.

C. The FCC Should Reject The RBOCs Contention That Wireless Alternatives And Cable Telephony, Including VoIP, Support A Finding That CLECs Are Not Impaired In The Mass Market Without Access To Mass Market Switching.

The vast majority of the evidence submitted into the record in this proceeding on October 4, 2004 by the RBOCs, including Verizon, and their national trade organization, USTA, is the presence of intermodal competition to support their claim that, for example, they should no longer be required to provide the UNE-P to CLECs. The PA OCA has fully addressed in its Comments submitted on October 4, 2004 why the presence of cable telephony providers, including VoIP, should not be used in any Section 251 unbundling analysis in this proceeding. The PA OCA will not reiterate those comments herein but will incorporate them by reference.[17] However, the PA OCA submits that the presence of wireless carriers also should not be a consideration in any determination made by the FCC as to whether CLECs are impaired without unbundled access to mass market switching for similar reasons.

Wireless service should not be consider a sufficient competitive presence under the Section 251 unbundling analysis because of the inherent distinctions between wireline and wireless services that often make the two incomparable. In many regards, wireless service does not represent an adequate substitute for local telecommunications service. For example, wireless service is not ubiquitous like wireline service because there are many areas where wireless reception is not possible, sometimes called "deadspots." In many rural areas in Pennsylvania, there is no wireless service. Additionally, wireless and wireline services also vary in their ability to provide access to the Internet. Even though wireless phones are increasing in their

[17] PA OCA Comments.

capabilities, clearly, wireless service is not a complete substitute for access to the Internet. Moreover, wireless services are less adequate in their provision of 911 service that further reduces the ability to substitute wireline service with wireless service. It is premature to consider wireless service an intermodal competitor to wireline service to support a finding by the FCC that CLECs are not impaired without access to the UNE-P.

Wireless service providers enjoy several advantages over many CLECs, yet do not provide sufficient substitute service to support a finding under the Section 251 unbundling analysis. Therefore, the FCC should reject the RBOCs contention that wireless service providers present adequate intermodal competition sufficient to support a finding that CLECs are not impaired without access to the UNE-P in Pennsylvania.

D. The USTA Comments Limiting States' Ability To Require Unbundling And Regarding Their Definition of Relevant Geographic Market Should Be Rejected.

In its Comments filed on October 4, 2004, USTA claims that state unbundling rules are preempted by TA-96 and that, if a state were to apply an impairment analysis contrary to the DC Circuit's holding by assuming "more unbundling is better," that state's action would be illegal.[18] USTA further argues that the geographic market for switching and high-capacity services should at a minimum be an MSA.[19] The PA OCA has previously articulated in its October 4, 2004 Comments both that the relevant geographic market should be density cells within MSAs and that the states do have the ability to impose additional unbundling obligations pursuant to Sections 251 and 271 of TA-96 to meet the specific needs and circumstances of their

[18] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Comments of the United States Telecom Association (dated Oct. 4, 2004)("USTA Comments") at 24-25.
[19] Id. at 21-22.

respective states. The PA OCA will not reiterate those Comments in detail but will incorporate them by reference into these Replies.[20]

However, the PA OCA will note, and support, the Comments filed by the Pennsylvania Public Utility Commission ("PA PUC") on October 4, 2004 at this docket which advocates for states to retain the ability to consider each states' specific circumstances in determining unbundling obligations.[21] The PA PUC cites to RBOC's Section 271 obligation as support for their position. The PA PUC stated:

> The PA PUC encourages the Commission to further address the processes, procedures and requirements associated with a BOC's section 271 obligations. We suggest an approach by which Section 271 obligations are tariffed, thus making the state commission's the "custodians" of the obligations. The Section 271 obligations would be those that each RBOC agreed to offer in exchange for the right to offer other intra LATA service in that state. Upon petition, the Commission should then make the determinations as to when the obligations can be relieved and provide the applicable BOC with the necessary express authorization to enable state commissions to allow the filed tariff to be modified, consistent with the Commission's determination.[22]

The PA OCA supports the PA PUC's position that state commissions should be the "custodians" of the incumbents' unbundling obligations. This ability should be based on both the incumbents' Section 251 and 271 obligations.

As such, the PA OCA submits that the FCC should reject USTA's Comments that advocate to limit states' abilities to tailor incumbents' unbundling obligations to meet the specific needs of their respective states. The USTA positions to the contrary should be rejected.

[20] PA OCA Comments at 9-13, 19-21.
[21] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Comments of the Pennsylvania Public Utility Commission (dated Oct. 4, 2004)("PA PUC Comments") at 4-8.
[22] Id. at 7-8 (emphasis added).

III. CONCLUSION

WHEREFORE, the Pennsylvania Office of Consumer Advocate respectfully requests that the Federal Communications Commission consider these Reply Comments, and the previously filed Comments, when acting on the Notice of Proposed Rulemaking in the above-referenced proceeding. In particular, the PA OCA submits that the FCC should continue the use of the UNE-P in the residential mass market in Pennsylvania.

Respectfully submitted,

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Dated: October 19, 2004
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